IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 24, 2006 at Knoxville

STATE OF TENNESSEE v. RODNEY ANTHONY BROWN

Appeal from the Criminal Court for Davidson County
No. 2005-A-198 J. Randall Wyatt, Judge

No. M2005-01735-CCA-R3-CD - Filed July 10, 2006

The defendant, Rodney Anthony Brown, appeals from the Davidson County Criminal Court's sentencing order. The defendant pleaded guilty to the October 30, 2004 aggravated assault of Keith J. Thompson, a Class C felony, *see* Tenn. Code Ann. § 39-13-102(a)(1)(B), -102(d)(1) (2003), and to unlawful possession of a handgun, a Class A misdemeanor, *see id.* § 39-17-1307(a). He agreed to accept a three-year, Range I sentence for aggravated assault and a concurrent sentence of 11 months and 29 days for the misdemeanor; he further agreed that the trial court would determine the manner of service of the effective three-year sentence. Following a sentencing hearing, the trial court ordered the defendant to serve his sentence in confinement. On appeal, the defendant claims he should have received judicial diversion or, in the alternative, full probation. We affirm the criminal court's effective denial of judicial diversion and its denial of alternative sentencing.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, J., joined. GARY R. WADE, P.J., not participating.

Jennifer Lichstein (at trial); Ross E. Alderman, District Public Defender; and Emma Tennent, Assistant District Public Defender, for the Appellant, Rodney Anthony Brown.

Paul G. Summers, Attorney General & Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Kathy Morante, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Testimony in the sentencing hearing established that, on October 30, 2004, the defendant and two other young men approached the Nashville residence of Shiekkia Lattimore on North Second Street. Ms. Lattimore was outside the residence with her boyfriend, Keith J. Thompson, and her two children were in the doorway to the residence. The defendant made a reference to a fight between his friends and Ms. Lattimore's brother and indicated that his interest

in the fight was related to the interests of a street gang known as the Gangster Disciples. During the conversation near Ms. Lattimore's doorway, the defendant held a handgun but did not fire it.

The defendant testified in the sentencing hearing that he was 18 years old, had a young son, was still in school, was employed, and lived with his mother. He apologized to the victim and to Ms. Lattimore. He denied that he had ever been a gang member. He testified that he had maintained his schooling even while in jail awaiting trial.[1] The defendant professed that he wished to earn a graduate equivalency degree (GED), attend an offender re-entry program, and take care of his son. He claimed that his troubles arose from his association with Gangster Disciple members, who were 10 years his senior. He testified, "I've been thinking [while in jail] since I ain't been around no females or nothing at school . . . ."

The defendant's mother testified that she would require the defendant to live with her, rather than with his grandmother, where he had been living on October 30, 2004. She affirmed that she would ensure the defendant's enrollment in GED classes, and offender re-entry program, and his employment at a Krystal's restaurant, where she was employed as manager. She testified that the defendant had always been a respectful son and that he had maintained a close relationship with his three-year-old son.

A counselor in the Davidson County Sheriff's Office offender re-entry program testified that the program was an alternative to incarceration and offered classes that included anger management, relapse prevention, and domestic violence prevention. He testified that he had interviewed the defendant and felt that the defendant was an appropriate candidate for the program; however, the counselor acknowledged that typically a member of a street gang would not be appropriate for the program.

The presentence investigator reported no history of criminal convictions or juvenile adjudications; however, the report shows that the defendant admitted that he began using marijuana when he was 15.

The trial court determined that any presumption of the defendant's favorable candidacy for alternative sentencing was overcome because the defendant was a "wanna be Gangster Disciple[]" and because he used marijuana. The court opined that probation would inappropriately depreciate the seriousness of the offense. Therefore, the court ordered the defendant to serve his sentence in confinement.[2]

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[1] The defendant testified that a special education homebound teacher visited him twice a week during his six-months in jail.

[2] The court's judgment indicates that the court would be amenable to a review of the defendant's sentence after he completes a program called "Lifelines" administered by the Metro Detention Center. The parties' briefs characterize "Lifelines" as an incarcerative program, but we note that the trial court's judgments describe "Lifelines" as a "CCA" program, a notation that generally refers to a community-based alternative to sentencing. Notwithstanding the notations, (continued...)

I. Judicial Diversion

The defendant first claims that the trial court erred in failing to grant judicial diversion.

"Judicial diversion" is a reference to Tennessee Code Annotated section 40-35-313(a)'s provision for a trial court's deferring proceedings in a criminal case. *See* Tenn. Code Ann. § 40-35-313(a)(1)(A) (2003). The result of such a deferral is that the trial court places the defendant on probation "without entering a judgment of guilty." *Id.* To be eligible or "qualified" for judicial diversion, the defendant must plead guilty to, or be found guilty of, an offense that is not "a sexual offense or a Class A or Class B felony," and the defendant must not have previously been convicted of a felony or a Class A misdemeanor. *Id.* § 40-35-313(a)(1)(B)(i). Diversion requires the consent of the qualified defendant. *Id.* § 40-35-313(a)(1)(A).

Eligibility, however, does not automatically translate into entitlement to judicial diversion. *See State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). The statute states that a trial court *may* grant judicial diversion in appropriate cases. Tenn. Code Ann. § 40-35-313(a)(1)(A) (2003) (court "may defer further proceedings"). Thus, whether an accused should be granted judicial diversion is a question entrusted to the sound discretion of the trial court. *Bonestel*, 871 S.W.2d at 168.

"Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion." *State v. Cutshaw*, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997). Accordingly, the relevant factors related to pretrial diversion also apply in the judicial diversion context. They are:

> [T]he defendant's criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

Id. at 343-44; *see State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993). Moreover, the record must reflect that the court has weighed all of the factors in reaching its determination. *Bonestel*, 871 S.W.2d at 168. The court must explain on the record why the defendant does not qualify under its

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[2](...continued)
we address the sentencing issues as do the parties – that the effective sentence is to be served in confinement.

analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. *Id.*

On appeal, this court must determine whether the trial court abused its discretion in failing to sentence pursuant to the statute. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168. Accordingly, when a defendant challenges the denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168.

In the present case, the defendant was eligible for judicial diversion, and he initially raised the issue by including the claim in his "Sentencing Memorandum," filed nine days before the sentencing hearing. During argument presented at the sentencing hearing, defense counsel asked for judicial diversion. We, therefore, believe that the issue was fairly presented to the trial court. We can find no reference in the trial court's findings, however, that addresses the defendant's application for diversion.[3] Although the tenor of the court's comments are that the court found that the defendant should be confined because he was a "wanna be Gangster Disciple," the court's comments are directed to the manner of service of his sentence, not whether a sentence should even be imposed pursuant to Tennessee Code Annotated section 40-35-313.

We conclude, however, that the trial court was unauthorized to consider judicial diversion. In *State v. Soller*, 181 S.W.3d 645 (Tenn. 2005), our supreme court held that a trial court may not grant judicial diversion when accepting a plea agreement that did not provide for the consideration of diversion. *Id*., 181 S.W.3d at 648. In the present case, the plea agreement defined the terms of the defendant's effective three-year sentence but provided that the trial court would determine the manner of service of such sentence. In the wake of *Soller*, we must inquire whether the manner-of-service feature of the plea agreement included a possibility of judicial diversion. We conclude that it does not. The agreement contains no reference to judicial diversion, and although the defendant's counsel mentioned the issue in the guilty plea submission hearing, it is clear that the state did not accede to a consideration of diversion and that, accordingly, no claim of amendment of the agreement is tenable. Also, as pointed out in *Soller*, a trial court's power to entertain judicial diversion is terminated when a judgment of guilty is imposed. *See id*. At 649. Recognizing that the judgment of conviction "set[s] forth the plea, the verdict or findings, and the *adjudication and sentence*," Tenn. R. Crim. P. 32(e) (emphasis added), we conclude that the plea agreement's provisions for specific *sentences* indicate the parties' contemplation that a judgment would be entered. Thus, we conclude that the trial court lacked jurisdiction to consider judicial diversion.

[3] The trial court's findings are presented in pages 62 through 67 of the sentencing hearing transcript; however, page 66 is missing.

II. Manner of Service of Sentences

We will now address the defendant's claims that he should have been granted full probation or, at least, some other form of alternative sentence.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. The court is required to consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b), -35-103(5) (2003).

The defendant is a standard, Range I offender convicted of a Class C felony and a Class A misdemeanor. As such, he is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. *See id.* § 40-35-102(6). However, this presumption does not entitle all offenders to an alternative sentence; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). The presumption of favorable candidacy for alternative sentencing may be rebutted, for instance, by a showing that confinement may be necessary to "protect society by restraining a defendant who has a long history of criminal conduct" or that "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." *See* Tenn. Code Ann. § 40-35-103(1)(A), (C) (2003).

A. Full Probation.

In the present case, the defendant claims that he should have been granted full probation. To be sure, he was eligible for probation. *See id.* § 40-35-306(2) (2003). However, the determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v.*

Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by Hooper*, 29 S.W.3d 9-10. A defendant is required to establish his "suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* Tenn. Code Ann. § 40-35-303(b) (2003); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d 9.

We hold that the defendant failed to establish his entitlement to full probation. Not only did the trial court find that the defendant had been a "wanna be Gangster Disciple," but the record shows that the defendant, at age 15, began an unrelenting use of marijuana, and although he had received no prior convictions or juvenile adjudications, he admitted that he had been "caught with Lortabs," a narcotic requiring a prescription. We believe his entanglement with a street gang and his criminal possession and use of controlled substances defeat his bid for full probation.

B. Other Sentencing Alternatives.

The presumption of favorable candidacy for alternative sentencing, which is applicable in the present case, may be overcome by showing that at least one of the conditions set forth in Tennessee Code Annotated section 40-35-103(1) is met. *See, e.g.*, *State v. Jimmy Ray Dockery*, No. E2004-00696-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Nov. 30, 2004) ("Although the defendant enjoyed the presumption of favorable candidacy for alternative sentencing, the record reveals two solid bases for overcoming the presumption: (1) that confinement is necessary to restrain a defendant who has a long history of criminal conduct and (2) that measures less restrictive than confinement have recently been applied unsuccessfully to the defendant."); *State v. Christopher C. Rigsby*, No. E2003-01329-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Knoxville, Dec. 29, 2003) ("[T]he record in this case amply demonstrates that the presumption of favorable candidacy for alternative sentencing in general was soundly rebutted by the defendant's extensive history of lawless behavior," citing Tennessee Code Annotated section 40-35-103(1)(A)); *see also State v. Nunley*, 22 S.W.3d 282, 286 (Tenn. Crim. App. 1999) (stating that although the factor "social history" must be considered "in determining whether to grant probation. . ., social history is not specifically mentioned by the code as a factor to be used in overcoming the presumption of suitability for alternative sentences").

The trial judge found that, because of the defendant's interest in gang activity, confinement was necessary to avoid depreciating the seriousness of the offense. *See id.* § 40-35-103(1)(B).

Upon our de novo review, we cannot say that the denial of alternative sentencing was baseless, and we affirm the judgment.

III. Conclusion

The judgments effectively denying judicial diversion and alternative sentencing are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE